Plutonium Class Action in Supreme Court

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The U.S. Supreme Court last week invited the Solicitor General to weigh in on the issues in a significant class action, in which the plaintiffs allege plutonium contamination. Merilyn Cook, et al. v. Rockwell International Corporation, et al., No. 10-1377 (U.S.).

The plaintiffs were more than 15,000 property owners near the former Rocky Flats Nuclear Weapons Plant in Colorado. In 2006, a jury found against defendants Dow and Rockwell. In 2008, the federal trial court ordered the companies to pay a total of $926 million in damages. The 10th Circuit reversed.

At issue now is whether state substantive law controls the standard of compensable harm in suits under the Price-Anderson Act, or whether the Act instead imposes a federal standard; and, secondly, whether, if a federal standard applies, a property owner whose land has been contaminated by plutonium must show some physical injury to the property beyond the contamination itself in order to recover.

The court of appeals had concluded that plutonium contamination by itself was not adequate under the Act. In particular, property owners' fears that the plutonium might damage their health was not a sufficient basis to award damages.

The case raises the all-too-familiar scenario of trial courts dispensing with traditional elements of a cause of action in order to proceed with class litigation. Plaintiffs alleged that defendants were responsible for plutonium emissions that diminished their property values. But they did not prove any present physical injury to person or property, or loss of use of property, on a class-wide basis. Rather, they vigorously --and successfully-- urged the district court to dispense with any such injury requirement. The district court allowed petitioners to recover based solely on a risk of injury to person or property, even if unverifiable or scientifically unfounded.